U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOHN BELIVEAU,

COMPLAINANT,

v.

NAVAL UNDERSEA WARFARE CENTER,

RESPONDENT.

ARB CASE NO. 97-097

ALJ CASE NOS. 97-SDW-1
97-SDW-4

DATE: AUG 14 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING INTERLOCUTORY APPEAL

Complainant in the above-captioned case has filed a Motion to Void Settlement Agreement and Reopen Complaint, pursuant to the employee protection provisions of one or more of the following statutes: the Toxic Substances Control Act of 1986, 15 U.S.C. §2622 (1988); the Water Pollution Control Act, 33 U.S.C. §1367 (1988); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1988); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 (1988); the Resource Conservation and Recovery Act 42 U.S.C. §6971 (1988); the Clean Air Act, 42 U.S.C. §7622 (1988) (collectively, the Acts); and the implementing regulations at 29 C.F.R. Part 24 (1996).

Complainant's instant allegations apparently concern his contention that the captioned Respondent breached a June 15, 1995 "Memorandum of Agreement and Settlement" (Settlement). The Settlement was entered by the parties to resolve an environmental whistleblower complaint (No. 95-107-05043) that Complainant had filed with the United States Department of Labor's Wage and Hour Division on February 7, 1995; Complainant supplemented his complaint on February 15, 1995. Complainant's Motion at 3. The Settlement was reached prior to completion of the Wage and Hour Division's investigation and Complainant withdrew his complaint. Id. at 3-4. Given the administrative stage at which the Settlement was

reached, neither an Administrative Law Judge (ALJ) nor the Secretary[1] of Labor reviewed or approved the Settlement.

The parties are currently in litigation before an ALJ (Case Nos. 97-SDW-1 and 97-SDW-4) concerning the alleged breach of the Settlement and certain of its terms and conditions. Complainant argues in his Motion that the Board has jurisdiction to hear these allegations at this time. Given the fact that there is no Recommended Decision and Order which has been issued by an Administrative Law Judge, we consider Complainant's filing to be in the nature of an interlocutory appeal.

Citing 28 U.S.C. §1292(b), Complainant notes that interlocutory "decisions" can be reviewed in those circumstances where a trial judge certifies a question to an appellate body for consideration. Complainant further alleges that the ALJ "certified" the question concerning the alleged breach of the settlement to the Board for review. This certification purportedly took place during a pre-hearing conference conducted on May 2, 1997. Complainant's Motion at 6. Also during that pre-hearing conference, Complainant alleges that the ALJ "declined to rule on [Complainant's] motion [to litigate the question of the alleged breach] because of the Judge's concern that the 1995 complaint and subsequent Settlement were not properly before the Office of Administrative Law Judges . . . ." *Id.*

Although the ALJ stated in the pre-hearing conference that he "would have no problem certifying [the questions of reopening the 1995 complaint and the Settlement]" to the Board, Pre-hearing Transcript (T.) at 45; see T. at 7, no such certification has been issued by the ALJ to date. In fact, during and at the conclusion of the pre-hearing conference, the ALJ suggested to Complainant's counsel that the question of the settlement agreement should be submitted to the appropriate Department of Labor agency (which is now the Occupational Safety and Health Administration) for investigation. T. at 43-44; 112.

Moreover, Complainant's citation in support of this request for interlocutory review is not on point. In Porter v. Brown & Root, Inc., 91-ERA-4, Sec. Ord. to Show Cause, Sept. 29, 1993, the Secretary issued an order to show cause why the ALJ's order should not be reviewed as the Recommended Decision and Order. The parties had settled the case, but conditioned the settlement on sealing portions of the record. The Secretary noted that the ALJ had issued an order in which he sealed the terms of a settlement agreement, declined to seal portions of the record which indicated the existence of a settlement agreement, and granted the parties' request that the issue of sealing portions of the record be certified for interlocutory appeal to the Secretary. The Secretary referred to the absence of regulatory provisions under either 29 C.F.R.

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[1] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the employee protection provisions of the Acts, their implementing regulations, certain other statutes, and an executive order to the Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization were also issued on May 3, 1996.

Parts 18 or 24 for interlocutory appeals, but stated that an ALJ may certify a controlling question of law to the Secretary pursuant to 28 U.S.C. §1292(b). However, the Secretary declined to exercise any discretion to entertain such an appeal, not wishing to set a new precedent.

We also choose to exercise our discretion and not entertain the present motion. The Board concludes that the best policy under these circumstances is to hew to the general principle that interlocutory appeals are strongly disfavored, for the reasons discussed in *Porter, supra,* Sec. Ord. to Show Cause, Sept. 29, 1993, and the cases cited therein. The courts, as well as the Secretary, have held that there is "a strong policy against piecemeal appeals. *" Admiral Insurance Co. v. United States District Court for the District of Alabama,* 881 F.2d 1486, 1490 (9th Cir. 1989); *Marchese v. City of Easton,* Case No. 92-WPC-00005, Sec. Ord., March 10, 1994, slip op. at 3-4. To date, the Secretary and this Board have refused to accept interlocutory appeals. *See Marthin v. TAD Technical Services Corp.*, Case Nos. 94-WPC-1, 2, 3, Sec. Ord. Denying Interlocutory Appeal, Aug. 22, 1994, slip op. at *1-2; Marchese,* at 3-4; *Manning v. Detroit Edison Corp.,* Case No. 90-ERA-28, Sec. Ord. Denying Permission to File Interlocutory Appeal, Aug. 23, 1990; *Corder v. Bechtel Energy Corp.,* Case No. 88-ERA-9, Sec. Ord., Oct. 3., 1988, slip op. at 2; *Shusterman v. Ebasco Services, Inc.,* Case No. 87-ERA-27, Sec. Ord. Denying Remand, July 2, 1987, slip op. at *2; Holub v. Babcock & King, Inc.,* Case No. 93-ERA-25, ARB Order [denying interlocutory appeal], July 8, 1996, slip op. at 2.

Complainant also argues that the Board should now assume jurisdiction over this matter because the Board, acting for the Secretary of Labor, "is specifically required under several of the environmental statutes referenced in [Complainant's] 1995 complaint to be a party to any settlement resulting in the dismissal of a complainant." Complainant's Motion at 6-7. It is true that the Secretary and the Board are specifically charged with being a party to settlement agreements under certain of the Acts. However, this authority is exercised only under the circumstances where a settlement is reached between parties after an appeal of a Department of Labor investigative agency (Wage and Hour or OSHA) finding to the Office of Administrative Law Judges, or where a settlement is entered after issuance of an ALJ's recommended order and such matter is before the Board for review. Complainant has cited no authority to support the proposition that either an ALJ or this Board may reopen and void a settlement agreement reached during the administrative investigation stage of a whistleblower complaint.

That having been said, we must note that our decision not to review this interlocutory matter should not affect the present litigation pending before the ALJ. The Settlement reached by the parties in this case, or the breach thereof, "may constitute a separate, independent violation" of the whistleblower protection provisions of the Acts. *See, Blanch v. Northeast Nuclear Energy Co.,* Sec. Order, May 11, 1994, slip op. at 4, n.2 (Secretary approved terms of settlement agreement recommended by ALJ, but referred questions of settlement breach to investigatory agency, Wage and Hour Division.) However, we will not now address such questions in the absence of a well-developed record and a recommended decision and order issued by the ALJ.

Accordingly, Complainant's request to the Board to consider an interlocutory appeal in this case prior to investigation,[2] discovery, a hearing, and issuance of a recommended decision and order is **DENIED.**

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[2] We, accordingly, refer Complainant's submissions to the Board to the Occupational Safety and Health Administration for action consistent with this Order Denying Interlocutory Appeal.